LIB.

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF GEORGIA PACIFIC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 87-82 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is the appeal of a $10,000 civil penalty for two alleged violations of the appellant corporation's National Pollutant Discharge Elimination System (NPDES) permit during the month of November 1986.

The case came on for hearing before the Pollution Control Hearings Board, on October 19, 1987, in Seattle, Washington. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

Appellant Georgia Pacific Corporation appeared by its Attorney, Robert R. Davis, Jr. Respondent Department of Ecology appeared by Charles W. Lean, Assistant Attorney General. Lesley Gray of Evergreen Court Reporting recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard, exhibits examined, and contentions made, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Georgia Pacific Corporation operates a paper, pulp and chemical complex in Bellingham, Washington. The facility discharges through a secondary (biological) treatment plant into the waters of Bellingham Bay. At all times relevant to this proceeding Georgia Pacific's discharges were regulated by an NPDES permit (Permit No. WA 000109-1), issued by the State Department of Ecology, which among other restrictions sets forth effluent limitations for biochemical oxygen demand (BOD) and total suspended solids (TSS).

II

Respondent Department of Ecology is an agency of the State of Washington with responsibility for administering state and federal water pollution control programs, including the NPDES permit program.

III

On a monthly basis, Georgia Pacific's NPDES permit limits

discharges to an average of 21,500 pounds per day of BOD and 33,600 pounds per day of TSS. Condition S1.

Permit condition G1 states:

> All discharges and activities authorized by this permit shall be consistent with the terms and conditions of this permit. The discharge of any pollutant more frequently than, or at a level in excess of, that authorized by this permit shall constitute a violation of the terms and conditions of this permit.

IV

BOD and TSS discharges from the Bellingham facility are measured by continuous monitoring equipment, the readings from which are used to derive daily 24-hour composites. Over a month's time, the average of these daily composites is computed to determine the "monthly average". The monitoring and computations are performed by Georgia Pacific, as a separate permit requirement. Condition S2. Discharge monitoring reports are made monthly to Ecology.

V

The report for November 1986 showed a "monthly average" for BOD of 24,200 pounds and for TSS of 37,400 pounds. There is no dispute that these exceedences of the permit effluent limitations occurred.

VI

RCW 90.48.144 provides for the assessment of a civil penalty on a strict liability basis for every violation of the conditions of a

waste discharge permit. The penalty incurred is "in an amount of up to ten thousand dollars a day" for each violation.

On April 27, 1987, almost five months after receiving the discharge monitoring report for November 1986, Ecology issued a Notice of Penalty Incurred and Due (No. DE 87-131), directed to Georgia Pacific, assessing a total penalty of $10,000 for exceeding the "monthly average" BOD and TSS limitations of its NPDES permit in November 1986.

From this assessment, appellant corporation appealed to this Board on May 18, 1987.

VII

The record does not disclose any corrective action taken by Georgia Pacific between the time of the violations in November 1986 and the time the penalty was issued in late April 1987.

However, by the time of our hearing in October 1987, the company had obtained new equipment which it hoped would permit it to achieve sufficient waste water reduction to solve the BOD and TSS problems.

VIII

Georgia Pacific has experienced difficulties in meeting discharge standards since the present lagoon was placed into operation in 1979.

Since July 1983, Ecology has fined the company 16 times for BOD exceedences and twice for TSS exceedences, not including the penalties at issue.

The pattern of penalties has been one of gradual escalation. Penalties in 1983 were for $250 per violation cited. In 1984 two early-year violations were assessed at $500 each and a late-year exceedence brought a $1,000 fine. In 1985, the first violation was assessed at $1,000 and the next fine resulted in penalties of $2,000 each. A final 1985 penalty was for $4,000. [1]

The penalties in the instant case - $5,000 for BOD and $5,000 for TTS - represented a further increase over past sanctions.

IX

The violations of the NPDES permit in November 1986 are not in dispute. The presentations in this case were directed to the aggregate penalty amount of $10,000. Appellants contend that the penalty is excessive in light of the efforts made to solve the problem and the circumstances surrounding the November discharges.

X

Since-mid 1983 Georgia Pacific has taken a series of remedial measures to improve the performance of its treatment system. These include the addition of more aerators and the lengthening of the path effluent must follow through the lagoon.

But, the approach known from the outset to present the surest

---

[1] In Georgia Pacific's current permit, issued in June of 1985, the BOD and TSS limitations were tightened slightly to reflect revised federal guidance on what can be achieved by available technology.

solution is reduction of waste water flow into the lagoon in order to increase retention time, with resultant improvements in BOD and TSS removal. Nonetheless, the flow reduction target originally planned for mid-1980 had not been achieved by November 1986 when the violations in question occurred. At our hearing in October 1987, the corporation reported that it was on the threshold of achieving the flow reduction needed.

XI

Georgia Pacific asserted that cold weather in November 1986 caused a reduction in biological activity beyond their control, and that this factor should be considered in mitigation of the penalty.

On the record before us we are unable to determine that ambient air temperatures were the likely cause of the exceedences. There is no evidence that temperatures in the lagoon were outside the 16 to 27 degrees centigrade range for which the system was designed.

XII

In any event, we find that adequate reduction in waste water flow - a technique within the company's control - would likely solve any problems which might arise from ambient air temperatures. Influent temperature will go up with less water flow since the same amount of heat from the mill will be contained in less water.

XIII

Any Conclusions of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board come to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B RCW and 90.48 RCW.

II

As noted, RCW 90.48.144 provides for penalties of up to $10,000 per day per violation of permit conditions. Ecology asserts that where the standard violated is of a type which requires an average of daily values for a month, the per day maximum can be assessed for each day of the month. The approach of the court in Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir 1986) supports such an interpretation of federal law penalty provisions.

If the Gwaltney approach were applied to the two state-law-based "monthly average" violations here, the theoretical maximum would be penalties totaling $600,000 (60 daily penalties assessed at $10,000 a piece).

III

We do not find it necessary to resolve the question of whether the Gwaltney approach is permissable under RCW 90.48.144. In the instant case, the penalty assessed was only one half of the maximum possible, if each "monthly average" exceedence were treated as a single

violation.

We note that in 1985 the legislature increased the statutory maximum from $5,000 to $10,000 per violation per day, reflecting an intent to treat actions contravening water pollution control laws with increased seriousness. Section 2, Chapter 316, Laws of 1985.

IV

The penalty statute sets forth the following in relation to the amount of penalty:

> . . . The penalty amount shall be set in consideration of the previous history of the violator and the severity of the violation's impact on the public health and/or the environment in addition to other relevant factors . . . . RCW 90.48.144.

The Board has included the likely effect of the penalty on influencing corrective behavior as among the "other relevant factors" considered in evaluating the amount assessed. Port Townsend Paper Corporation v. DOE, PCHB 86-136 (1988).

Remedial actions are relevant because the purpose of civil penalties is to deter future violations, both of the perpetrator and of the public generally. See Cosden Oil Co. v. DOE, PCHB 85-111 (1986). The most influential post-violation activities, therefore, are those occurring between the time the violations occurred and the time the penalty was assessed. Weyerhaueser Company v. DOE, PCHB Nos. 86-224 and 87-33 (1988).

V

Applying the several factors to be weighed, we are impressed by the extensive history of violations here. Given such a continuing pattern of violations, the escalation of penalties pending the resolution of the difficulty is consistent with the statutory purpose. The idea is to apply the heat until the problem is solved.

Further the lack of demonstrated public health or environmental harm does not much affect the appropriateness of penalty amounts in a NPDES permit violation case. The whole premise of the federal Clean Water Act, which the state implements through permit issuance under its own statutes, it that harm does not need to be shown. The scheme is, in general, one of strict liability for unlawful discharges. See SPIRG of New Jersey v. Georgia Pacific, 615 F. Supp. 1419 (1985). In the broad sense, harm is legislatively presumed.

Finally, we are not persuaded that the circumstances here or the remedial measures employed before issuance of this penalty are such as to call for its reduction on ground of prior satisfaction of the statute's deterrence aims.

Under all the facts and circumstances we conclude that the $10,000 penalty assessed in this case was not excessive.

IX

Any Findings of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

Department of Ecology Notice of Penalty Incurred and Due No. DE 87-131 is affirmed.

DATED this 11th day of July, 1988.

POLLUTIONS CONTROL HEARING BOARD

WICK A. DUFFORD, Chairman

JUDITH A. BENDOR, Member